UBER, THE TAYLOR REVIEW, MUTUALITY, AND THE DUTY TO NOT MISREPRESENT EMPLOYMENT STATUS

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Abstract
Do employing entities have a responsibility to not misrepresent the employment status of their staff? This article suggests that recent jurisprudence does create this responsibility. The article starts, first, by discussing the much-awaited Taylor Review, released in July 2017. This purported to address the problems of employment rights and tax in the software driven 'gig' economy. Four main groups of Taylor's recommendations were to relabel employment statuses and write more secondary legislation, reform tax, cut paid holidays, and introduce new 'soft' labour rights. These proposals do not address the real issues. Second, this article explains why a test for employment status highlighted by Taylor – 'mutuality of obligation' – has not formed part of binding UK Supreme Court jurisprudence since *Autoclenz Ltd v Belcher*. Third, it discusses what the Taylor Review did not: the problem of misrepresentation of employment status, which has become closely associated with the gig economy. In October 2017, the Supreme Court issued a pathbreaking judgment that changed the requirements for fraud cases, aligning the tests for civil and criminal fraud, and therefore making fraud claims easier. This is relevant because of the very serious finding, in *Aslam v Uber BV* [2017] IRLR 4, [96] by the Employment Tribunal that Uber provided an 'excellent illustration... of "armies of lawyers" contriving documents in their clients' interests which simply misrepresent the true rights and obligations on both sides'. This raises the question of whether 'contriving' to 'misrepresent' something enables fraud claims, either by staff who seek employment rights, or by public authorities for tax receipts or social security contributions.

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INTRODUCTION

A problem of labour law across the world is that while 'everyone' has the universal human right to social security, fair pay, unions, equality and leisure,[1] rights must be enforced. Mostly,[2] the days are past when men like F.W. Taylor denigrated their staff, saying an 'intelligent gorilla' could be trained to be 'more efficient... than any man can be'.[3] Most organisations treat their staff as human beings, not 'human resources', with rights that managers themselves expect. They abide by law. But in the 'gig economy', some are still denying that their employees' rights exist. Enforcement mechanisms have strained across the globe. A United States DC Circuit Court case, *FedEx Home Delivery v National Labor Relations Board* shows

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1 Universal Declaration of Human Rights 1948 arts 22-24. Those rights are *jus cogens* norms of international law, and binding on the UK through its International Labour Organisation membership, and ratification of the International Covenant on Economic Social and Cultural Rights 1966 arts 7-9

2 See JC Wong, 'Uber CEO Travis Kalanick caught on video arguing with driver about fares' (1 March 2017) Guardian, the CEO saying to a driver employee, who was bankrupted after Uber unilaterally varied its percentage of driver fares, 'Some people don't like to take responsibility for their own shit. They blame everything in their life on somebody else. Good luck!'

3 FW Taylor, *The Principles of Scientific Management* (1911) 40

the problem's extent.[4] FedEx lawyer Ted Cruz (who later likened himself to 'the Uber of Washington'[5]) submitted that, if they assume 'entrepreneurial opportunity', people are independent contractors, not employees. Cruz won that case, but in dissent, Garland J said this was not the common law test. He could 'detect no such evolution' in the law.[6] Garland J, who remains on the DC Circuit, reflected the law in most countries. A combination of control, personal work, economic reality and bargaining power,[7] define employment status and rights for the vast majority of people across the globe.[8]

In this context – with serious advocates of 'government shut down' spreading[9] – a new report was submitted to the UK government: *Good Work: The Taylor Review of Modern Working Practices* (July 2017). Many hoped that the Taylor Review would draw on legal expertise, make concrete proposals and support international labour standards, even against powerful corporate interests. They were disappointed. This article will (1) summarise the Taylor Review's essential points, (2) explain why the 'mutuality of obligation' concept, which Taylor highlights, is no part of the law for employees, and (3) discuss the pathbreaking new Supreme Court case law on the meaning of fraud. It discusses whether this could be applied to employing entities, which have been found to hire 'armies of lawyers' who are 'contriving documents in their clients' interests which simply misrepresent the true rights and obligations on both sides'.[10]

1. Taylor Review

The Taylor Review was much awaited by people across the labour movement, government, and industry. On its release, and though it is a lengthy document, it essentially contained four main groups of recommendation. First, we should relabel the intermediate 'workers' category as 'dependent contractors', and make 'greater use of secondary legislation' to clarify what the categories mean.[11] Second, it says that tax levels for employed and self-employed 'should be moved closer to parity'.[12] It applauds the 'Estonian Tax and Custom Board' who 'have been working with Uber' on a 'project which simplifies taxation for Sharing Economy Workers'.[13] Third, it says that 'rolled-up holiday pay' should be re-introduced. Instead of getting holidays, people get an entry of '12.07 per cent' in their pay slips.[14] Fourth, it advocates a new range of 'soft' rights: for people to request (but not have) a direct contract or fixed hours, to be consulted

4 563 F3d 492 (DC 2009). The results of the majority decision, that truck drivers for FedEx had no right to collectively bargain, probably violates the ILO Collective Bargaining Convention 1949 (c 98), a core Convention in international law.

5 See B Bordelon, 'Ted Cruz: I'm Just the Uber of Washington' (16 December 2014) National Review, likening himself to a 'disruptive app'.

6 See *US v Silk,* 331 US 704 (1947) and *Nationwide Mutual Insurance Co v Darden*, 503 US 318 (1992)

7 On three main elements of bargaining power, see A Smith, *The Wealth of Nations* (London: Strahan and Cadell, 1776) Book I, ch 8, §12 (ability to 'hold out' in negotiations from greater resources), JS Mill, *Principles of Political Economy* (London: Parkier, 1848) Book V, ch XI, §12 (advantages in taking collective action) and WS Jevons, *Theory of Political Economy* (1888) ch 4, §74 (advantages in information).

8 Basic standards are reflected in the ILO Employment Relationship Recommendation 2006 (no 198) Preamble, ss 5 and 12. See further Z Adams, L Bishop, and S Deakin, *CBR Labour Regulation Index (Dataset of 117 Countries)* (2016)

9 e.g. K Lee, 'Trump says we need a government shutdown. Here's what's happened in the past' (7 May 2017) LA Times

10 *Aslam v Uber BV* [2017] IRLR 4, [96]

11 Taylor Review (2017) 34

12 Taylor Review (2017) 72

13 Taylor Review (2017) 80

14 Taylor Review (2017) 47

on (not participate in) company decisions with over two workers, and for 'naming and shaming' of employers who fail to pay Tribunal awards (not contempt of court).[15] All this apparently flowed from Taylor's 'single overriding ambition' that all 'work in the UK economy should be fair and decent'.[16]

It is wholly unclear how the Review's proposals meet the aim. First, relabelling 'worker' status (like rebranding the 'minimum' as a 'living wage'[17]) does not change the law. The Employment Relations Act 1999 section 23 already enables government to pass orders for more people to get employment status.[18] It has not been used. Even if it had been, social rights, like access to justice,[19] must not be an on-off switch, flipped at the Executive's discretion. Second, tax reform is needed. But a corporation like Uber, which has been directly accused of evading value added tax,[20] corporation tax,[21] and indirectly accused of evading income tax and National Insurance,[22] is probably not well placed to advise the UK or any government on how tax should work. Third, reintroducing 'rolled-up holiday pay' would, as the litigation to ban that practice showed in 2006,[23] be the same as abolishing paid holidays. For anyone earning more than the minimum wage, employers will probably reduce wages by the rolled up holiday pay rate. This eliminates the right, and deprives the law of its social objective: that people actually take holidays.[24] Fourth, rights to request rights, be consulted or cause publicity, do not work when firms have strong conflicting monetary incentives. Agency work, zero hours' contracts, and aggressive sham self-employment contracts are used because the law is not being enforced. This creates a regulatory subsidy for unfair work.

While calling for 'Clarity in the law' (chapter 5) and criticising 'ambiguous legislation', the Taylor Review is loaded with obscure platitudes. Its 'Seven steps toward fair and decent work with realistic scope for development and fulfilment' (chapter 14) exemplify this. It says 'good work' is something 'for which we all need to take responsibility'. It says that 'flexibility and... opportunities... should be protected while ensuring fairness'. It also says that law 'should help firms make the right choices',[25] that 'companies should be seen to take good work seriously', and we should 'record and enhance the capabilities developed in formal and informal learning'. We should 'develop a proactive approach to workplace health'. Lastly, people should 'progress in their current and future work'.[26] These words do not mean anything. They are

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15 Taylor Review (2017) 63
16 Taylor Review (2017) 6
17 See E McGaughey, 'All in 'It' Together: Worker Wages Without Worker Votes' (2016) 27(1) King's Law Journal 1
18 Employment Relations Act 1999 s 23, referring to rights under TULRCA 1992, ERA 1996 and 'any instrument made under section 2(2) of the European Communities Act 1972'.
19 Exemplified by *R (Unison) v Lord Chancellor* [2017] UKSC 51 (holding Employment Tribunal fees *ultra vires*).
20 J Croft and M Murgia, 'Uber faces legal challenge on paying VAT' (20 March 2017) FT. T Connelly, 'An Uber-legal challenge: Jolyon Maugham QC crowdfunds more than £100,000 to launch VAT High Court case' (27 July 2017) Legal Cheek
21 'Uber pays £22,000 tax on £866,000 UK profit' (20 October 2015) Guardian and O Williams-Grut, 'Uber's rival says it uses 'tax avoidance on an industrial scale,' and wants Europe to investigate' (31 July 2015) Business Insider
22 e.g. P Mason, 'Bogus self-employment exploits workers and scams the taxman' (13 March 2017) Guardian, referring obliquely to the idea that 'cab driver' for whom 'you paid an app'.
23 *Robinson-Steele v RD Retail Services Ltd* (2006) C-131/04, [48] 'the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community social law from which there can be no derogations
24 See further UDHR 1948 art 24
25 Taylor Review (2017) 110
26 Taylor Review (2017) 111

the opposite of what Lord Wedderburn called 'hard legal analysis allied to an alternative social vision',[27] just incoherent third way rhetoric, when people want a real way forth. The Taylor Review must therefore be regarded as a squandered opportunity.

Perhaps the Review's most regrettable feature is its misleading statements about the present law. First, in 115 pages, it refers to just one single case: *Aslam v Uber BV*.[28] Upheld to the letter in the Employment Appeal Tribunal,[29] Uber drivers are entitled to the minimum wage and holiday pay. They are workers. As explained below, on the case's findings of fact, it is arguable that they are employees too. But the Review says the Tribunal judgment 'only applies to the two drivers who brought the case'.[30] This fundamentally misunderstands the doctrine of precedent in common law, as recently explained by the Supreme Court in *R(UNISON) v Lord Chancellor*. Decisions in cases have the function of providing guidance about how future courts will decide similar issues in the future. Using the example of *Donoghue v Stevenson*, as Lord Reed put it, to say that a decision in a case is 'no value to anyone other' than the litigants, the 'lawyers and judges involved in the case would be absurd.'[31]

Second, the Review says that we should 'align the employment status framework with the tax status framework', as if this has not been the consistent jurisprudence since *Young and Woods Ltd v West*.[32] It also appears to imply, without any justification, that a 'temporary cessation of work' of just one week necessarily breaks an employment contract.[33] This is completely wrong under statute and House of Lords authority.[34] But third, and most misleading of all, is the Review presumes without any justification, that 'those working in the gig economy' are not already employees in law.[35] One reason for this presumption could be that it argued that the current legal tests include 'whether there are ongoing contractual obligations to provide and perform work (sometimes known as mutuality of obligation)'.[36] There is no doubt that this notorious test has lingered in the worse side of case law, but the next part explains what should be regarded as the dominant legal opinion: it should be no part of the law.

2. 'MUTUALITY OF OBLIGATION' IS NOT A TEST FOR EMPLOYMENT

The lack of enforcement has been a consistent theme in labour law's scope since 1983, after Lord

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27 KW Wedderburn, *Labour Law and Freedom* (London: Lawrence and Wishart, 1992) Preface. See further KD Ewing et al, *A Manifesto for Labour Law: towards a comprehensive revision of workers' rights* (Liverpool: IER 2016) iv, reviewed in [2017] 46(1) ILJ 169

28 *Aslam v Uber BV* [2017] IRLR 4

29 *Aslam v Uber BV* [2017] UKEAT 0056_17_1011

30 Taylor Review (2017) 63, and further 'many have suggested that the judgment... means all Uber drivers are workers'.

31 See *R(UNISON) v Lord Chancellor* [2017] UKSC 51, [67]-[69] onwards, from 'It may be helpful to begin by explaining briefly the importance of the rule of law, and the role of access to the courts in maintaining the rule of law.'

32 *Young and Woods Ltd v West* [1980] EWCA Civ 6

33 Taylor Review (2017) 45. It is impossible to know what the Review's authors were thinking, because they give no references.

34 Under ERA 1996 s 212 and *Ford v Warwickshire CC* [1983] 2 AC 71 (where a teacher who had a summer break still had employment continuity) a week in which there is no contract of employment can still count towards continuity of employment if there is no cessation of work. The Taylor Review appears to say that s 212 is the only meaningful route towards maintaining continuity since establishing an umbrella or global contract is 'difficult in circumstances where there is genuine flexibility on both sides' but this statement is highly problematic for reasons discussed below.

35 Taylor Review (2017) 37

36 Taylor Review (2017) 33

Denning retired from being Master of the Rolls.[37] It afflicts casual, agency, zero hours, and now gig-economy staff. Mostly, these are the very people for whom Parliament has guaranteed rights. They were guaranteed rights in law, because they lack power to bargain for rights in the market.[38] But in *O'Kelly v Trusthouse Forte Ltd*, a new Court of Appeal led by Sir John Donaldson MR, held that for casual waiters (seeking to unionise) to be 'employees', their employer had to have accepted an ongoing duty to offer work, and the staff an ongoing duty to accept it. This threatened to drive a conceptual coach and horses through every labour right, because an employer could simply say 'we owe no rights because we drafted the contract to deny an ongoing duty to offer and accept work'. If contractual consent is a requirement for a right, the very right is lost. On the face of it, the House of Lords immediately qualified *O'Kelly*'s effect in the context of the statutory concept of continuity of employment in *Ford v Warwickshire CC*. This confirmed that temporary breaks in employment (like casual workers might have) may not matter for the purpose of maintaining statutory employment rights.[39] Today it is clear the right to unionise is universal.[40]

But even after *Ford*, rival tests ran like parallel worlds through nearly thirty years of case law.[41] One line of case law held up the *O'Kelly* definition of mutuality.[42] This morphed into two ideas. First, this 'mutuality of obligation' was said to be required during any period of work. This was argued, for example, to deny employee status to staff like the *O'Kelly* waiters, who were ostensibly under no 'obligation' to show up for any particular assignment. This is an argument to evade employment rights, because any employer would be able to simply write a contract denying any duty to call someone up exists: it attempts to make all casual or 'zero hours' contract staff self-employed.

Second, it was said that *O'Kelly* mutuality is necessary for an employment contract to exist between specific periods of working activity. Supposedly, agency staff or 'on demand' staff on 'zero hours' would lose employee rights between periods of active work. This is like saying someone ceases to be an employee every time they have a weekend or take a lunch break, and is also an attempt to evade employment rights. It has been consistently rejected in case law on the minimum wage and working time,[43]

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37 cf *Cassidy v Ministry of Health* [1951] 2 KB 343, *Stevenson, Jordan & Harrison v MacDonald & Evans* [1952] 1 TLR 101, and *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248.

38 e.g. Second Reading of Contracts of Employment Act 1963, Conservative Minister for Labour, John Hare MP, 'I repeat that these are minimum standards. The object of the Bill is not only to bring everybody up to the minimum but also to encourage employers to improve on the minimum on a voluntary basis.' Hansard HC Debs (14 February 1963) vol 671, col 1505

39 Noted in P Davies and M Freedland, *Labour Law: Text and Materials* (2nd edn 1984) 100, and see also ERA 1996 s 212.

40 See *Wilson v United Kingdom* [2002] ECHR 552 and Universal Declaration of Human Rights 1948 art 23(4) replicated in the International Covenant on Economic, Social and Cultural Rights 1966 art 8 or ILO Convention 98.

41 S Deakin and GS Morris, *Labour Law* (6th edn 2012) 164 ff

42 See *James v Greenwich LBC* [2008] EWCA Civ 35 and *Carmichael v National Power plc* [1999] UKHL 47, opinion given by Lord Irvine LC, previously counsel for employer in *O'Kelly*, appointed by ex Prime Minister Blair, counsel for the employer in *Nethermere*. *Carmichael* was not referred to in *Autoclenz* and should be regarded as overruled.

43 e.g. *British Nursing Association v Inland Revenue* [2002] EWCA Civ 494, [19] per Buxton LJ, 'the alternative that is apparently contended for by the appellant, that the employees are only working when they are actually dealing with phone calls with all the periods spent waiting for calls excluded, would, in my view effectively make a mockery of the whole system of the minimum wage.' Neuberger J and Peter Gibson LJ agreed. Note that for the minimum wage, the nurses only needed to be workers, but were plainly employees as well.

and this rejection is partially codified in the statutory continuity provisions.[44] In response, some cases said that an 'umbrella contract' could be deduced from an arrangement, a concept which appears to have been invented off the cuff in *O'Kelly*.[45] But why should that be needed? In absence of any statement an employment relationship should simply be deemed to be indefinite. Precisely because of this, an employment contract can only be terminated according to law, requiring notice and good faith dealing.[46]

Aside from all this, the other line of cases was to the effect that the only mutual obligations needed for a contract are consideration: work for a wage,[47] and no need for *O'Kelly* mutuality during, or between, active work. Then in *Autoclenz Ltd v Belcher*, the UK Supreme Court ended the debate. It set out an exhaustive multi-factor test for who is an employee. Twenty car valets, working through an intermediary agent, claimed the minimum wage and holiday pay. They needed to be workers, and were successful because they were also employees. The Supreme Court recalled three factors from *Ready Mixed Concrete*,[48] and then recapitulated them in light of authorities it approved.[49] These are (i) there is the 'irreducible minimum obligation on each side to create a contract of service' which was defined as 'consideration',[50] (ii) the employer may exercise control 'in a sufficient degree', and (iii) there is personal performance of work, mostly 'by one's own hands' although a limited power of delegation may exist. Underpinning these factors is an overall guiding principle that 'the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed'.[51]

At no stage did the Supreme Court accept, or even indirectly refer to the *O'Kelly* concept of mutuality, or any cases that endorse it.[52] It did the opposite. The Supreme Court in *Autoclenz* specifically endorsed the 'consideration' view of mutuality in the 'critical findings' of Foxwell J: that 'there were mutual obligations, namely the provision of work in return for money'.[53] Furthermore, it referred to Stephenson LJ's judgment in *Nethermere v (St Neots) Ltd v Gardiner*, which expressly defined mutual obligations as consideration,[54] not an ongoing duty to offer and accept work. Indeed, Stephenson LJ was

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44 Employment Rights Act 1996 s 212. S Deakin and G Morris, *Labour Law* (2016) 222, say s 212 'can be read as giving statutory recognition to certain extra-contractual expectations of the employee.' See also A Smith, *Lectures on Justice, Police, Revenue and Arms* (1763) Part 1, 'The foundation of contract is the reasonable expectation...'

45 See *O'Kelly v Trusthouse Forte plc* [1984] QB 90, 124-5.

46 ERA 1996 ss 86, 94, 135 and *Wilson v Racher* [1974] ICR 428, approved in *West London Mental Health NHS Trust v Chhabra* [2013] UKSC 80, [35]-[37] also acknowledging 'an implied contractual right to a fair process' (regardless of qualifying periods).

47 See *McMeechan v Secretary of State for Employment* [1996] EWCA Civ 1166, and note its absence in *Dacas v Brook Street Bureau (UK) Ltd* [2004] EWCA Civ 217, and *Cable & Wireless plc v Muscat* [2006] EWCA Civ 220.

48 *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, relying on *US v Silk* 331 US 704 (1947)

49 *Autoclenz Ltd v Belcher* [2011] UKSC 41, [18]-[19]

50 [2011] UKSC 41, [18] refers to *Nethermere* [1984] ICR 612, 623, which quotes MacKenna J, as below.

51 [2011] UKSC 41, [35]

52 Notably, there is no mention of the entirely inconsistent decision of *Carmichael v National Power plc* [1999] UKHL 47, where the lead judgment was given by Lord Irvine LC, who was previously the advocate for the employer in *O'Kelly*.

53 [2011] UKSC 41, [37]

54 [1984] ICR 612, 623, per Stephenson LJ, 'Of (iii) MacKenna J. proceeded to give some valuable examples, none on all fours with this case. I do not quote what he says of (i) and (ii) except as to mutual obligations: "There must be a wage or other remuneration. **Otherwise there will be no consideration, and without consideration no contract of any kind**. The servant must be obliged to provide his own work and skill."' Emphasis added.

plainly rejecting the *O'Kelly* definition, because he knew that counsel (Mr Anthony Blair) had been submitting that it was relevant in the Employment Appeal Tribunal.[55] The Court of Justice of the European Union said in 2004 that *O'Kelly* mutuality is 'of no consequence'.[56] This was clearly right.

No principled argument exists for why the *O'Kelly* definition of mutuality should be part of the law. First, Parliament has never consented to it, and probably never would, because it is a conceptual vehicle to undermine labour rights. Second, the overwhelming majority of legal opinion rejects its place in the law. As well as the UK Supreme Court in *Autoclenz*, and the Court of Justice of the EU in *Allonby*, those highly critical of *O'Kelly* include (to list just a few) Sir Bob Hepple,[57] Professor Sandra Fredman,[58] Professor Simon Deakin and Professor Gillian Morris,[59] Professor Catherine Barnard,[60] Professor Hugh Collins,[61] and the list goes on. When Professor Mark Freedland (who equally rejects *O'Kelly*) revived the analysis of an employment contract often involving ongoing obligations, this was an observation designed to throw light on the juridical structure of employment, not a proposal for a test.[62]

But now in Supreme Court case law, a consistent, principled position has developed. Employees are those with less in 'relative bargaining power'. Workers in the intermediate category, like in *Clyde & Co LLP v Bates van Winkelhof*,[63] will be analogous to law firm partners: with more relative capacity to bargain for rights, not less, than the general employee. A plumber earning well above the UK median wage might be another example, but is certainly in a grey zone.[64] The principle must depend on whether people can genuinely bargain rights for themselves with their employers, but are in the scope of enterprise risk and responsibility against the employer's 'clients' or 'customers'.[65] In *Braganza v BP Shipping Ltd*, the Supreme Court squarely stated the reasons. Here, a widow successfully claimed that her late-husband's employer breached an implied term, taking irrelevant considerations into account, when finding he committed suicide. A suicide finding meant the employer would not pay death benefits. According to Lady Hale, 'the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract.'[66]

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55 [1983] ICR 319

56 *Allonby v Accrington and Rossendale College* (2004) C-256/01, [72] for classification of a worker: 'The fact that no obligation is imposed on them to accept an assignment is of no consequence in that context...' The same is true in all other jurisdictions: V De Stefano, 'Casual Work Beyond the Casual in the EU' (2016) 7(3) European Labour Law Journal 421, 436-9

57 B Hepple, 'Restructuring Employment Rights' (1986) 15(1) ILJ 69, 71, *O'Kelly* 'deliberately ignored' Freedland's analysis.

58 S Fredman, 'Labour Law in Flux: The Changing Composition of the Workforce' (1997) 26 ILJ 337, 347, 'a long shadow'

59 S Deakin and G Morris, *Labour Law* (6th edn 2012) 164, 'it cannot therefore function as an indicator of employee status.'

60 C Barnard, 'The Personal Scope of the Employment Relationship' (2004) JILPT Comparative Labor Law Seminar, 'invidious'

61 H Collins, KD Ewing and A McColgan, *Labour Law: Text and Materials* (2nd edn 2005) 165, that m.o.o. is 'consideration'

62 MR Freedland, *The Contract of Employment* (1976) 21-22. See O Gierke, *The Social Role of Private Law* (1889) 32, on 'relations that begin in contract but last over a period of time', translated by E McGaughey in (2018) German Law Journal (forthcoming)

63 *Clyde & Co LLP v Bates van Winkelhof* [2014] UKSC 32

64 *Pimlico Plumbers Ltd v Smith* [2017] EWCA Civ 51, [45] 'receipts of £130,753... expenses totalling £82,454.' cf *Stringfellow Restaurants Ltd v Quashie* [2012] EWCA Civ 1735 which has been subjected to considerable criticism in E Albin, 'The Case of Quashie: Between the Legalisation of Sex Work and the Precariousness of Personal Service Work' (2013) 42(2) ILJ 180.

65 *Catholic Child Welfare Society v Institute of the Brothers of the Christian Schools* [2012] UKSC 56, [67] and [75] on the principles. See further S Deakin, "Enterprise Risk': The Juridical Nature of the Firm Revisited' (2003) 32 Industrial Law Journal 97.

66 *Braganza v BP Shipping Ltd* [2015] UKSC 17, [18]

What must be avoided is that the people with the least bargaining power lose employee rights in a sham contract, as a conflicted employer profits from their labour. There are inconsistent Court of Appeal judgments. It was particularly regrettable that binding Supreme Court authority, like *Autoclenz*, was barely engaged with in cases like *Smith v Carillion (JM) Ltd*.[67] As the Supreme Court put it in *Gisda Cyf v Barratt*, the 'need to segregate intellectually common law principles relating to contract law, even in the field of employment, from statutorily conferred rights is fundamental.'[68]

3. Uber and the duty not to misrepresent employment status

(1) The meaning of fraud

Legitimate legal argument must be distinguished from profit-driven evasion of other people's rights. This raises the question of whether sham self-employment could generate a claim for fraud. It used to be the case that mistakes and misrepresentations about the law were not actionable, but this position was altered by the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council*.[69] After this, the principle was applied in tenants' rights cases. For example, in *Pankhania v Hackney London Borough Council*, a claimant argued the council had misrepresented that a property, sold by auction, was occupied by a licensee. In fact, all the legal requirements for a tenancy under *Street v Mountford* existed. Therefore the council was liable to pay damages for misrepresentation.[70]

Nevertheless, fraud claims are inherently problematic. Their dimensions were often poorly understood as until October 2017, two main meanings of fraud existed in criminal and civil law.[71] However, in *Ivey v Genting Casinos (UK) Ltd*, the Supreme Court confirmed that there is now simply one test to establish dishonesty, and fraud, in both branches of law. First the 'actual state of mind as to knowledge or belief as to facts' must be established by a 'fact-finding tribunal'. Second, 'whether [a defendant's] conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people'.[72] This means that (1) if a fact-finding Tribunal has made statements about the 'actual state of mind' of an employer, and (2) this falls below objective social standards of honesty, there could be fraud. Only stage (1) requires any assertion of fact by a claimant about a defendant. Stage (2) is an application of law, with regard to the social context.

Although there is now one test for fraud, there are obviously criminal and civil categories of

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67 *Smith v Carillion (JM) Ltd* [2015] EWCA Civ 209

68 *Gisda Cyf v Barratt* [2010] UKSC 41, [39]

69 [1999] 2 AC 349

70 *Pankhania v Hackney LBC* [2002] EWHC 2441 (Ch). See *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1303, [118]-[119]

71 cf *R v Ghosh* [1982] EWCA Crim 2. This had two part test (and therefore fraud), requiring (1) someone to have done something dishonest by honest people's standards, and (2) to have subjectively appreciated others would think it dishonest. Part (2) has now changed, so there is no requirement to appreciate one has been dishonest. This adopted *Royal Brunei Airlines Sdn Bhd v Tan* [1995] UKPC 4, per Lord Nicholls, 'not acting as an honest person would in the circumstances'. *Twinsectra Ltd v Yardley* [2002] UKHL 12, as properly interpreted by *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [10] per Lord Hoffmann, 'by ordinary standards a defendant's mental state would be characterised as dishonest.'

72 [2017] UKSC 67, [74]. The case held that Ivey was unable to claim £7.7m in winnings from the Genting Casinos because he had won by cheating, by 'edge sorting' with an accomplice, at a card game called Punto Banco.

consequence. The Fraud Act 2006 imposes a maximum 10 year prison sentence for fraud by 'false representation' to make a 'gain', and company directors, managers or officers who have consented or connived in the scheme are jointly liable.[73] In civil law, fraud is relevant in actions for breach of trust, or vitiating contracts for misrepresentation. It is also relevant for exemplary damages, where a defendant's 'conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable.'[74] Yet whether criminal or civil, 'fraud unravels everything',[75] including separate legal personality of companies that are 'used as an engine of fraud.'[76] Moreover, whether civil or criminal, there are strong professional incentives for lawyers not to make fraud allegations without significant proof of the facts. In addition, allegations of the subjective element of fraud (at stage (1)) which assert a fact about someone's state of mind, may raise a spectre of defamation claims, something that even academic authors and publishers would be imprudent to ignore.[77]

(2) UBER

In *Aslam v Uber BV*, the Employment Tribunal itself made certain critical findings of fact. It said the following.[78]

> This is, we think, an excellent illustration of the phenomenon of which Elias J warned in the *Kalwak* case[79] of "armies of lawyers" contriving documents in their clients' interests which simply misrepresent the true rights and obligations on both sides.

This finding (relevant for stage (1) of the fraud test) could be a serious cause for concern. Aslam and other drivers had claimed they were entitled to the minimum wage and paid holidays.[80] For this they needed to be 'workers', either by having 'employee' status, or non-employee-workers who personally perform work but not for a client or customer.[81] In the contracts between Uber and its drivers, the so called 'Partner Terms' asserted that an Uber driver would be 'an employee or business partner of... the Partner' of Uber, even though typically the 'Partner' was the driver itself.[82] In this way, it attempted to deny that the drivers were employees or workers of Uber. The Tribunal held the drivers were workers for Uber, leaving open whether the drivers might also count as Uber's employees. Indeed Uber itself suggested drivers could be employees, just of their own companies or other entities.[83]

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73 Fraud Act 2006 ss 1(3), 2 and 12(2). Also 'cheating the Revenue' remains an offence: Theft Act 1968 s 32
74 *Rookes v Barnard* [1964] UKHL 1, per Lord Devlin
75 See *Petrodel Ltd v Prest* [2013] UKSC 34, [18] quoting *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702, 712, per Denning LJ
76 [2013] UKSC 34, [89] per Lady Hale
77 cf Defamation Act 2013 ss 5-6 (on the extent of privilege for academic journals).
78 *Aslam v Uber BV* [2017] IRLR 4, [96]. Also at [83] Uber's written terms 'are designed to misrepresent' the relationship.
79 *Consistent Group Ltd v Kalwak* [2007] IRLR 560 (EAT) [57]
80 National Minimum Wage Act 1998 s 1 and Working Time Regulations 1998 reg 13
81 Employment Rights Act 1996 s 230(3)(b)
82 [2017] IRLR, [32]
83 [2017] IRLR, [93] 'the drivers fall full square within the terms of the 1996 Act, s 230(3)(b) . It is not in dispute that they undertake to provide their work personally. For the reasons already stated, we are clear that they provide their work 'for' Uber.

The Tribunal's language, brandishing Shakespeare, suggests that it was completely unpersuaded by Uber's submissions.[84] In particular, the Short Oxford Dictionary of English defines 'contrive' as meaning to 'create or bring about (an object or a situation) by deliberate use of skill and artifice'. If written assertions by 'armies of lawyers' of non-employment status are 'deliberate' and also a 'misrepresentation', does this mean that the Employment Tribunal has made a finding of an 'actual state of mind' which amounts to fraud? The Employment Appeal Tribunal has repeated the same finding,[85] and may have even gone further. While the question on appeal remained confined to worker status, as the drivers claimed the minimum wage and holiday pay, Eady J emphasised passages from *UNISON* on the need for proper enforcement of employee rights, given the inherent imbalance of power.[86]

There seems to be increasingly little doubt, if any, from the findings of facts in *Aslam* that Uber drivers are workers in UK law and could well be employees, just like the car valets were employees in *Autoclenz*. The Tribunal elaborated on the way that Uber drivers are monitored and controlled on take-it-or-leave-it contracts.[87] Indeed, the surveillance is invasive: literally tracking the drivers' every move. While they have some leeway, Uber drivers face a system of sanctions for not taking a quota of rides.[88] It follows that Uber drivers pass all tests for employee status in *Autoclenz*: they do work for a wage, they are controlled, and they personally perform work. They even fulfil the non-requirement of 'mutuality of obligation'. Furthermore, the EAT explicitly upheld the finding that Uber drivers are still working for Uber when they do not have passengers, but are "on call" awaiting the next ride.[89] Uber exercises all the functions of a typical employer.[90] Uber's contracts were misrepresenting that economic reality.

Could Uber argue that the Employment Tribunal has made no finding about its 'actual state of mind' (stage (1))? Perhaps it could, although it would have to contend with the fact that its senior management will be very aware that an accelerating number of jurisdictions have held that Uber drivers are its employees. These include findings in a Hamburg Administrative Court in Germany for the purpose

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We are equally clear that they do so pursuant to a contractual relationship. If, as we have found, there is no contract with the passenger, the finding of a contractual link with Uber is inevitable.... Just as in *Autoclenz*, the employer is precluded from relying upon its carefully crafted documentation because, we find, it bears no relation to reality. And if there is a contract with Uber, it is self-evidently not a contract under which Uber is a client or customer of a business carried on by the driver. We have already explained why we regard that notion as absurd.'

84 [2017] IRLR 4, [87] quoting W Shakespeare, *Hamlet*, Act III, scene ii, 'The lady doth protest too much, methinks.'

85 *Aslam v Uber BV* [2017] UKEAT 0056_17_1011, [73]

86 *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [6] per Lord Reed, 'Relationships between employers and employees are generally characterised by an imbalance of economic power. Recognising the vulnerability of employees to exploitation, discrimination, and other undesirable practices, and the social problems which can result, Parliament has long intervened in those relationships so as to confer statutory rights on employees, rather than leaving their rights to be determined by freedom of contract. In more recent times, further measures have also been adopted under legislation giving effect to EU law. In order for the rights conferred on employees to be effective, and to achieve the social benefits which Parliament intended, they must be enforceable in practice.'

87 *Aslam v Uber BV* [2017] IRLR 4, [48]-[51] explaining positive instructions, presentation, and surveillance through app.

88 *Aslam v Uber BV* [2017] IRLR 4, [51]-[53] explaining the penalty mechanisms for failing to work to meet Uber's demand.

89 [2017] UKEAT 0056_17_1011, [119]-[124] per Judge Eady QC. It is, however, respectfully submitted that it was an error to say at [121] 'there will simply be no mutuality of obligation between assignments' for zero hours contracts. Aside from 'mutuality of obligation' not being a requirement for a contract, there is no credible authority or principled reason to distinguish 'assignment specific work', for the purpose of any employment right, from piece, time, salaried or unmeasured work. A contract is presumed continuous unless shown otherwise: ERA 1996 s 210(5). Temporary cessations of work from one to 25 weeks do not break a contract's continuity (s 212), so why would a break of 15 minutes or an hour?

90 See J Prassl, *The Concept of the Employer* (OUP 2015) reviewed in (2017) 37(2) Oxford Journal of Legal Studies 482.

of social security (below), in Sao Paulo, Brazil also for social security,[91] in South Africa,[92] Switzerland,[93] and even in Uber's home state after a ruling of the California Labor Commission.[94] There are conflicting opinions.[95] But most intriguingly, the Court of Justice of the European Union has given an unusually strong indication that it thinks the same. In a preliminary reference from Spain, the CJEU was asked to decide whether Uber is a transport service.[96] Uber (as well as denying that its drivers are employees or its passengers are consumers) denied that it is a transport service. It wanted to be an 'information society service', ostensibly because Uber uses online software, to get freedom to forum shop between member state laws.[97] The Grand Chamber, unsurprisingly, rejected Uber's argument that it was not a transport service. But in doing so it went out of its way, quite unnecessarily, to outline critical factors about Uber drivers:[98]

> from the information before the Court that the intermediation service provided by Uber is based on the selection of non-professional drivers using their own vehicle, to whom the company provides an application without which (i) those drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers. In addition, Uber exercises decisive influence over the conditions under which that service is provided by those drivers. On the latter point, it appears, inter alia, that Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion.

In other words, Uber exercises all the functions of an employer, and its drivers fulfil all the criteria of employees: under control for conditions of service, payments, the quality of vehicles, and subject to 'the ultimate sanction for good conduct, the power of dismissal.'[99]

(3) The cost of misrepresenting rights

It is sometimes thought gig-economy staff benefit from not being classified as employees. First, it is true that non-employee workers potentially pay less in tax by receiving generous deductions for business expenses expenses, for instance for vehicles and running costs. On the other hand, they lose the chance to

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91 'Sao Paulo Judge: Uber Drivers Are Employees, Deserve Benefits' (14 April 2017) Fortune.
92 'Uber drivers are now considered employees in South Africa – here's what it means' (14 July 2017) BusinessTech.
93 'Uber vs Suva in Swiss driver employee ruling' (5 January 2017) Euronews.
94 S Sanders, 'California Labor Commission Rules Uber Driver Is An Employee, Not A Contractor' (17 July 2015) NPR.
95 e.g. D Marin-Guzman, 'Uber wins Fair Work Commission case over drivers' employment rights' (5 January 2018) Australian Financial Review, pointing out that the driver in the case had no legal representation.
96 *Asociación Profesional Élite Taxi v Uber Systems Spain SL* (2017) C-434/15
97 Electronic Commerce Directive 2000/31/EC art 3 and Information Society Standards Directive 98/34/EC art 1(2)
98 (2017) C-434/15, [39]
99 cf *Cassidy v Ministry of Health* [1951] 2 KB 343, per Denning LJ

receive the same assets and materials for which an employing entity could itself make deductions. Second, self-employed people do usually pay 9, not 12 per cent in National Insurance Contributions.[100] But the monetary value of rights probably outweighs this 3 per cent gap.[101]

However the cost of lacking employee status is not solely borne by the staff. There is also a vital public interest. According to a 2016 survey by HMRC, taxpayers see corporate tax avoidance (let alone evasion) as dishonest.[102] This is potentially relevant for a stage (2) in a claim for fraud, on people's objective standards of dishonesty. In addition to employee contributions, there is normally a 13.8 per cent employer contribution for National Insurance. For example, in London alone Uber claims it has 40,000 drivers. Assuming an Uber driver is earning the UK median wage, this means Uber could be avoiding around £2820.19 per driver each year in National Insurance Contributions. Assuming Uber's driver numbers are roughly accurate, this could mean a loss of £112,806,720 every year, in London, alone to the National Insurance Fund.[103] Even if an individual might choose (or is misled) to pay 3 per cent less in National Insurance contributions the short-term, there is a long-term public interest in ensuring everyone has properly funded retirement and social insurance. Nevertheless, the attempt to not pay this kind of tax or social security contributions appears to have become essential to business model of companies like Uber, CitySprint,[104] Deliveroo,[105] and others. It continues wherever rights are under-enforced.

Yet Uber and the others wait for someone to sue, and have a record of threatening public authorities with open conflict, if they do.[106] Already with a million drivers in 2015,[107] Uber stands among the world's largest employers, yet claims it has no employees, and its employees have no rights. It argues the same with its consumers. If companies are not acknowledging employment rights, or not paying taxes and social security contributions that are properly due, this creates a regulatory subsidy. It can enable and finance a strategy of loss making expansion. Indeed, Uber lost $2.8 billion in 2016.[108] In UK and EU competition law, there is a strong possibility that such behaviour could be challenged as predatory pricing.[109] It rests on investor speculation that national regulators will fold, and courts in major

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100 Social Security Contributions and Benefits Act 1992 ss 1, 5 and 8

101 e.g. ERA 1996 s 86, notice or pay in lieu before dismissal by itself wholly offsets extra NICs for anyone working between one month and 33.3 weeks (3% NICs x 33.3 = one week's pay). Also SSCBA 1992 s 151-155 on statutory sick pay. ERA 1996 ss 71-75K on paid child care leave. *Devonald v Rosser & Sons* [1906] 2 KB 728, on right to expected pay if no work is available, etc

102 e.g. HMRC and Preena Shah, 'Exploring public attitudes to tax avoidance in 2015' (2016) HM Revenue and Customs Research Report 401, finding 'the majority (61%) also responded that it was never acceptable to use a tax avoidance scheme. The most frequent reason given as to why it was unacceptable was that 'it is unfair on others who pay their taxes'.'

103 If National Insurance Contributions by employers are 13.8 per cent, and Uber drivers are earning £28,600, NICs should be £2820.19. This multiplied by 40,000 drivers in London means £112,806,720. However, it is doubtful that Uber's claims of 40,000 drivers in London can be trusted: many of these will not be full time employees. It is also doubtful that Uber's driver employees are all earning the median wage each year, despite Uber's claims about how good driver conditions are. Therefore these calculations must be seen as a rough hypothesis, yet one that indicates the potential problem's scale.

104 See *Dewhurst v CitySprint UK Ltd* (5 January 2017) Unreported. See (7 January 2017) BBC News.

105 e.g. S Butler, 'Deliveroo accused of 'creating vocabulary' to avoid calling couriers employees' (5 April 2017) Guardian

106 e.g. A Kassam, 'Uber threatens to leave Quebec in protest at new rules for drivers' (26 September 2017) Guardian

107 L Lazo, 'Uber turns 5, reaches 1 million drivers and 300 cities worldwide. Now what?' (4 June 2015) Washington Post. At the time of writing, Uber is operating in over 600 cities.

108 L Hook, 'Uber registers $2.8bn loss in 2016 expansion drive' (14 April 2017) Financial Times

109 See Competition Act 1998 s 18, TFEU art 102 and *Post Danmark A/S v Konkurrencerådet* (2012) C-209/10, [45]. cf B Rogers, 'The Social Costs of Uber' (2015) 82 University of Chicago Law Review Dialogue 85, in a superb article for the US, suggests: 'Concerns about monopoly therefore seem premature.' US antitrust law has been deregulated out of existence. At 100, Rogers

jurisdictions will not enforce the law.

More and more jurisdictions, however, are enforcing their laws. Germany's case is most instructive. Uber was held to have violated taxi licensing requirements in September 2014.[110] On appeal, the High Administrative Court of Hamburg stressed that taxi licenses required payment of income tax and social security contributions,[111] which follow from Uber drivers having employee status. But then, Uber kept running unlicensed vehicles. So in 2015, Uber was penalised €250,000 for each violation.[112] This led to Uber's withdrawal from Germany. Since then, Uber refused to comply with the law, and was banned from Denmark,[113] to Italy,[114] to Finland.[115] In Taiwan, Uber was banned until it agreed to use drivers who were employees of rental car companies.[116] In Spain and France, its apps have been banned too. Finally, in September 2017, Transport for London announced it would revoke Uber's licence, primarily for its repeated failure to abide by the laws on reporting rape and sexual assault of Uber passengers.[117]

Conclusions

Throughout the UK the law must be upheld, including an end to sham-self-employment. Corporations which misrepresent other people's rights should not be regarded as legitimately defending their legal position. The costs to employees, consumers, and taxpayers are too high. It is irrelevant that tax authorities, bound by government priorities and with limited resources, have not acted themselves. Indeed, they are often waiting for clarification in court. The calculation to profit from the law's under-enforcement justifies exemplary damages: both to strip all profits in an individual case,[118] and further to ensure no business model may exploit the law's under-enforcement.[119] Economic innovation brought about by technological ingenuity is no doubt a public good, but cultivating legal uncertainty through aggressive litigation 'may also produce large profits for powerful business interests' that courts would rightly

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mentions the absurd risk that Uber may sue its own drivers for organising unions: this directly violates the Clayton Act of 1914 §6 (15 USC §17), on any reasonable interpretation. At 102, Rogers highlights Uber's 'size, power, and ambitions'.

110 See 'Berlin and Hamburg ban for taxi app Uber' (29 September 2014) Out-law.com and K Rawlinson, 'Uber service 'banned' in Germany by Frankfurt court' (2 September 2014) BBC News.

111 Hamburg High Administrative Court Judgment (24 September 2014) Az. 3 Bs 175/14, [26] '*Denn es sprechen überragende Interessen der Allgemeinheit dafür, dass Gelegenheitsverkehr zur Personenbeförderung jedenfalls dann nicht genehmigungsfähig ist, wenn, wie vorliegend, der Unternehmer für die gewerbliche Nutzung nicht versicherte Fahrzeuge einsetzt und das Entrichten von Einkommensteuern und Sozialabgaben für die Fahrer sowie von Umsatzsteuern für die Entgelte in dem Geschäftsmodell nicht vorgesehen sind. Zum einen kann die Allgemeinheit ohne die verlässliche Zahlung von Steuern und Sozialabgaben nicht funktionsfähig bleiben. Daher gehört die Pflicht, beide abzuführen, zu den zulässigen Einschränkungen der Berufswahlfreiheit.* ' This translates as: 'It is in the overriding interests of the public, that service vehicles for personal transportation are under no circumstances authorised, if, as in the present case, the undertaking deploys uninsured vehicles for commercial use and does not provide for the payment of income taxes and social contributions [i.e. pensions, health care, unemployment, etc] in its business model. For one thing, public administration cannot function without the reliable payment of taxes and social contributions. Therefore the duty in both respects exists as a permissible limitation on the freedom to conduct a business.'

112 'Uber banned in Germany as police swoop in other countries' (20 March 2015) BBC News reporting Landgericht Frankfurt am Main Judgment (18 March 2015) Az. 3-08 O 136/14 (in German)

113 R Milne, 'Uber shuts down business in Denmark' (28 March 2017) Financial Times

114 T Bradshaw, 'Uber faces another setback after ban in Italy' (8 April 2017) Financial Times

115 A Hern, 'Uber presses pause on primary taxi service in Finland until 2018' (6 July 2017) Guardian

116 B Bland, 'Uber running out of road in Taiwan' (5 January 2017) Financial Times and SH Hsuan, 'Uber is back – without 'Uber drivers'' (14 April 2017) China Post.

117 N McIntyre, 'Uber London ban: The scandals that brought down the ride-hailing app' (22 September 2017) Independent.

118 See *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122, especially per Lord Nicholls at [67]

119 D Owen, 'A Punitive Damages Overview: Functions, Problems and Reform' (1994) 39(2) Villanova Law Review 363, 380-1

scrutinise with particular sensitivity.[120] The private gains of the gig-economy today are outweighed by the social cost to everyone else. We must not be distracted, as the Taylor Review seemed to be, by glitzy rhetoric of techno-utopia. Frequently this conceals hard conflicts of interest, like those of the Taylor Review member who had been profiting from Deliveroo shares.[121] If the law is upheld the benefits of technology, instead of disproportionately enriching a few, will create a truly 'sharing economy'.

[120] To paraphrase Lord Walker in *R (Sainsbury's Supermarkets Ltd) v Wolverhampton CC* [2010] UKSC 20, [81] on compulsory purchase used to benefit private corporations. Business must not compulsorily purchase other people's employment rights.

[121] A Ram, 'Taylor review member was early Deliveroo backer' (10 July 2017) Financial Times. Greg Marsh's excuse to the paper was he 'engaged transparently with the Taylor review'. No disclosure is in the Review itself.